agreement of October 6, 1981. I further order that the defendants pay damages to the plaintiffs upon assessment of such damages in respect of which assessment directions will be given on application. The defendants will pay the costs of the action and of the assessment of damages.

Order accordingly.

Solicitors : *Zainur & Maydien; Chooi & Co.*

ELF PETROLEUM S.E. ASIA PTE. LTD. v. WINELF PETROLEUM SDN. BHD.

[O.C.J. (George J.) November 6 & 26, 1984]

[Kuala Lumpur – Suit No. C 2360 of 1983]

Contract – Liquidated demand for balances outstanding – Debt not disputed – Liability to pay notwithstanding arbitration clause.

Arbitration – Arbitration clause in an agreement – Claim admitted – No dispute has arisen – Settlement by arbitration not required.

Practice and Procedure – Agreement providing disputes to be tried in a foreign country – Jurisdiction of local courts not ousted.

In this case, the plaintiff, a Singapore company had supplied petroleum products to the defendants. On that account the defendants owed a large sum of money to the plaintiffs. When the plaintiffs demanded payment, the defendants agreed to clear the debt within 5 years. This was not acceptable to the plaintiffs who brought an action against the defendants. The defendants then applied to the court for an order that the writ of summons be struck off because of clause XIII of the agreement under which it was alleged Malaysian courts have no jurisdiction and because of arbitration clause (clause XIV) in the agreement.

Held: (1) parties had agreed that Singapore law would govern any dispute. This did not oust the jurisdiction of the Malaysian Courts to try an action arising out of the agreement;

(2) where a claim is admitted it does not call for a settlement by arbitration.

Cases referred to:

(1) *London & North-Western Rly. Co.* v. *Jones* [1915] 2 K.B. 35.
(2) *The Fehmarn* [1957] 2 All E.R. 707 and [1958] 1 All E.R. 333, C.A.

CIVIL SUIT.

Jagjit Singh for the defendants/applicants.

K.S Narayanan (*Anand Krishnan* with him) for the plaintiff/respondents.

Cur. Adv. Vult.

George J. : The plaintiffs, a Singapore company, had entered into a written agreement dated July 1, 1978 with the defendants, a Malaysian company, in respect of the marketing, selling and distribution in Malaysia of certain petroleum products to be supplied by the Singapore company. Pursuant to the agreement petroleum products were supplied by the plaintiffs to the defendants from time to time and the claim of the plaintiffs is a liquidated demand for the balances outstanding (together with interest thereon) being the price of the said products sold and delivered to the defendants. The plaintiffs also seek an order restraining the defendants from using the word ELF in their trading name.

With their letter of March 21, 1983 the plaintiffs submitted to the defendants the statement of accounts for the month ended February 28, 1983 in respect of the account between the parties; the balances outstanding as shown in the statement were:

(1) Singapore Dollar Account	S$2,427,961.98
(2) Malaysian Ringgit Account	M$1,546,933.42

The said covering letter, a copy of which was exhibit PS2 to the affidavit of Philippe Steff affirmed on September 6, 1983, enclosure (2), states: "If we do not hear from you within *seven (7) days* from the date of this letter, we shall assume that the outstanding figures are in order and correct."

By their letter of March 31, 1983 to the defendants, the plaintiffs purported to terminate the said agreement of July 1, 1978 and reiterated in the letter of termination that the aforesaid amounts on the two accounts were still due and owing. They required the defendants to "kindly let us know how and when do you propose to settle the amounts due to us." The defendants replied to that letter of March 31, 1983 by their letter of May 5, 1983 in which reply they stated that "the two most outstanding issues" between the parties were the current debts of the defendants to the plaintiffs and the prices of petroleum products to

be supplied in the future by the plaintiffs to the defendants. This reply is exhibited as exhibit PS4 to Philippe Steff's affidavit. I understood the contents of that letter to amount to proposals to renew and restart relations between the parties which called for the settlement of the aforesaid two issues in respect of which the defendants submitted a proposed new price list in respect of petroleum products to be supplied in the future. The defendants' proposal for settlement of the debts was that they would initiate plans to completely clear the overdue accounts within five years. They proposed that future supply of products would be on a cash basis. To my mind the clear conclusion to be arrived at on the reading of the aforesaid three letters is that the defendants accept that the amounts owing by them to the plaintiffs were as stated by the plaintiffs in their two letters of March 21 and 31 respectively. What they wanted was time to settle the debt.

It would appear that the proposal to settle the outstanding amounts in five years was not acceptable to the plaintiffs in that on September 7, 1983 they caused the writ herein to issue against the defendants.

The application before me enclosure (7) is the application on the part of the defendants for an order that the writ of summons be struck off and for costs on the grounds that (1) because of clause XIII of the agreement the Malaysian Courts have no jurisdiction to entertain the action and (2) because of clause XIV which is an arbitration clause. The clauses are as follows:

"XIII. *Law of Performance*

This agreement shall be read and construed in accordance with the Laws of Singapore.

XIV. *Arbitration*

Any claim or controversy arising out of this Contract shall be settled by arbitration. The arbitration shall be held in Singapore and conducted in accordance with the Rules of the International Chamber of Commerce of Singapore. The arbitrator court shall consist of two arbitrators (one to be appointed by each party) and, in the event of the arbitrators differing, by an Umpire to be agreed upon by the Arbitrators before commencing the arbitration or, in default of such agreement, nominated by the President for the time being of the International Chamber of Commerce of Singapore.

The first question to be considered is whether the claim brought by the plaintiffs against the defendants by this writ is a claim or controversy within the meaning of clause XIV of the agreement. In *London and North-Western Railway* v. *Jones*,[1] Rowlatt J. in dealing with an arbitration clause said:

"It is now quite clear from the decisions in *London and North Western Ry. Co.* v. *Donellan*, and *Midland Ry. Co.* v. *Loseby* that if there is a difference of any kind arising under the section before action, that matter must be decided by arbitration and the Courts have no jurisdiction to determine that difference. It does not, however, follow that the Courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying. This much at any rate is clear from the decision in the House of Lords in *London and North Western and Great Western Joint Ry. Cos.* v. *Billington*, where the company did obtain judgment in the Courts although there had been no arbitration. If that case proceeded upon the basis that, as upon the findings of the county court judge the defendant had accepted the services with full knowledge of what was charged without contesting their reasonableness, he could not be heard to say that there was any difference and must be treated as having agreed the charges in spite of the fact that he protested he would not pay, no difficulty arises. It may be, however, that though no difference has arisen before action in the shape of a demand made and challenged, it cannot be shown on the other hand that the demand has been agreed to."

The learned editors of *Russel* on Arbitration 17th Edition cited the aforesaid judgment of Rowlatt J. in support of their contention that "mere refusal to pay upon a claim which is not really disputed does not necessarily give rise to a 'dispute' calling an arbitration clause into operation."

As has been seen the correspondence amounts to an admission of the debt as claimed. Even in the affidavit filed in support of this application the debt is not disputed. However, in the second affidavit of Al Rashid Mohd. Ibrahim filed in reply to Philippe Steff's affidavit, the deponent, who is the Managing Director of the defendant company, avers "that the defendants had at no time admitted owing the plaintiffs the sum of M$1,546,933.42 and S$2,427,961.98", and in support of this averment referred the Court to exhibits PS4 and PS5 exhibited to the affidavit of Philippe Steff. PS4 has already been looked at. PS5 is a letter from the defendant company to the plaintiffs dated May 14, 1983 and is a follow-up of the earlier letter of May 5, 1983 where it is stated: "Second, we have agreed that we will settle the old debt. Letter to the effect was dated May 5, 1983" (exhibit PS4 aforesaid).

I fail to see that these letters demonstrated that the amounts claimed had been disputed. On the

contrary they amount to an admission of the amount claimed.

Reference was also made by Al Rashid Mohd. Ibrahim to what was called a memorandum of agreement dated March 15, 1980 which he says terminated all previous agreements between the parties. If that were so then the invocation by the defendants of clauses XIII and XIV of the agreement of July 1, 1978 cannot be permitted! The defendants are blowing hot and cold.

In my judgment what we have is a mere refusal to pay upon a claim which had been admitted as being owing to the plaintiffs. There is nothing to be settled by arbitration. On a true construction of clause XIV only claims which are *bona fide* disputes or are *bona fide* controversies, that call for settlement by arbitration. Where a claim is admitted it does not call for a settlement by arbitration. All that is called for is for payment of the admitted amount which can be by an action in the Courts as has been done in the instant case.

As to clause XIII, that the parties had agreed that Singapore law would govern the reading of the agreement does not oust the jurisdiction of the Malaysian Courts to try an action arising out of the agreement. See *The Fehmarn*[2] where even when the agreement provided that disputes arising therefore should be tried in tribunals of a foreign country the English Courts had held that that did not oust the English Courts jurisdiction to try the disputes.

I held that the defendants' application enclosure[7] failed on both counts. It was dismissed with costs.

Application dismissed.

Solicitors : *Jagjit Singh & Co.; Ng Ek Teong & Partners.*

PANG TEN FATT & ANOR. v. TAWAU TRANSPORT CO. SDN. BHD. & ORS.

[O.C.J. (Wan Mohamed J.) January 14, 1985]

[Tawau – Civil Suit No. T 127 of 1981]

Company Law – Private company – Rights given to founder members under articles of the company – Amendment of relevant articles depriving them of those privileges and rights – Amendment null and void – Articles providing for vacation of office of director absenting himself from three consecutive meetings of the Board – Director validly disqualified under the articles – Companies Act, 1965, s. 31.

In this case the proprietors and Managers of three bus Companies in Tawau formed a private company known as Tawau Transport Co. Sdn. Bhd. Certain rights and privileges were given to founder members under articles 11 and 71 of the company's articles. Plaintiffs together with two other persons were named permanent directors having an allowance of $200 per month. Plaintiff No. 1 was appointed secretary of the company on a salary of $1,900 per month while plaintiff No. 2 was appointed station master on a monthly salary of $1,050. The services of the plaintiffs were terminated by giving 3 months' notice on their reaching the age of 55 years.

The Articles of Association of the company also provided for vacation of office of a director if he absented himself from three consecutive meetings of the Board. Both the plaintiffs also ceased to be directors as they failed to attend three consecutive meetings of the Board.

The plaintiffs filed a suit against the company and other directors claiming that their dismissal as secretary and station master respectively was null and void. They also prayed for reinstatement as director and for a declaration that the proposed amendments to articles 11 and 71 were wrongful.

Held: (1) the plaintiffs have ceased to be directors of the Company in accordance with the articles of the company as they failed to attend three consecutive meetings of the Board;

(2) plaintiffs were founder members of the company and they held their respective posts by agreement and arrangement at the time of formation of the company. They are not to be treated as ordinary workers or employees of the company. Notice terminating their services are null and void;

(3) the amendments to articles 11 and 71 are null and void as they infringe the rights and privileges given to some individuals on the formation of the company.

CIVIL SUIT.

Joseph Lee for the plaintiffs.
Edward Tsen for the defendants.

Cur. Adv. Vult.

Wan Mohamed J.: Both the plaintiffs in this